

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs July 24, 2007

STATE OF TENNESSEE v. MICHAEL WAYNE POE

Direct Appeal from the Criminal Court for Hamilton County

No. 237715 Don W. Poole, Judge

No. E2006-02551-CCA-R3-CD - Filed August 27, 2007

The Defendant, Michael Wayne Poe, appeals from the trial court's determination that he violated the terms of his probation by abusing and killing his infant son. Because substantial evidence supports the trial court's judgment, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which J.C. McLIN and D. KELLY THOMAS, JR., JJ., joined.

Larry G. Roddy, Dayton, Tennessee, for the Appellant, Michael Wayne Poe.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; William H. Cox, III, District Attorney General; Neal Pinkston, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

The Defendant was originally convicted of child abuse arising out of an incident in the spring of 2001. After appeal, he was sentenced to three years of split confinement,¹ which was ultimately reduced to unsupervised probation because of the Defendant's medical condition. One of the requirements of the Defendant's probation was that the Defendant not violate the laws of the State of Tennessee during the duration of his three year sentence.

On October 2, 2006, the Defendant was indicted by the Rhea County Grand Jury for first degree murder, felony murder, and aggravated child abuse. On October 12, 2006, the Hamilton

¹See *State v. Michael Wayne Poe*, No. E2003-00417-CCA-R3-CD, 2004 WL 1607002 (Tenn. Crim. App., at Knoxville, July 19, 2004), *perm. app. denied* (Tenn. Dec. 20, 2004).

County District Attorney alleged that the Defendant had violated the terms of his probation by committing the crimes alleged in the Rhea County indictments. At a hearing on the motion to revoke the Defendant's probation, the following evidence was presented:

Tennessee Bureau of Investigation Special Agent Luke Muhonen testified that he was called to the Rhea County Medical Center on August 18, 2006, where he found a twenty-one day old infant child with what appeared to be "noticeable bruising on the head, neck and body region." The child was brought to the hospital after the Defendant's wife, the child's mother, called 911 from their residence. Agent Muhonen testified that he viewed and photographed the child's body, and he proceeded to interview a number of witnesses. In his initial interview, the Defendant stated he had no idea how the injuries occurred, but he stated he was in the apartment from August 17 until the 911 call was made August 18. The Defendant was interviewed a second time, and, after he was Mirandized, he again denied knowing the origin of the injuries to the child.

On cross-examination, Agent Muhonen testified that his investigation indicated that only the child's mother, Tammy Poe, and the child's father, the Defendant, were at home with the child prior to the 911 call. Agent Muhonen suspected that the Defendant harmed the child because Tammy Poe told him that she and the Defendant were giving the child a bath when the child slipped under the water. Tammy Poe told Agent Muhonen that the child began to cry, and the Defendant picked up the child and shook him aggressively. Tammy Poe also indicated that the Defendant then picked up the child by the child's face, and set the child on the couch, from which the child promptly rolled off, onto the floor.

Dr. William T. Bates, III, testified that he was the emergency room doctor the night the Defendant's child was brought into the emergency room. Dr. Bates testified that the child was in cardiac arrest, and they attempted to resuscitate him but were not successful. Dr. Bates examined the child and noted extensive bruising over his scalp, face, the back of his neck, and across his clavicles and chest, and he further observed that the child had blood coming from his nose and mouth. Dr. Bates also noted a significant cut behind the child's ear, which went into the cartilage. When asked if the injuries might be consistent with the child being picked up by his face, Dr. Bates responded, "That could be assumed, yes, sir." Dr. Bates testified that, although the bruising to the child's chest and sternum could have been caused by CPR, the clavicle, scalp, and face bruising, along with the cut behind the ear, could not. Dr. Bates opined that the serious cut behind the child's ear could not have been caused by an accident.

On cross-examination, Dr. Bates stated that the cut could have been caused by an accident, if the child fell "from a distance." Dr. Bates reiterated that the bruising on the collarbone could not have been caused by CPR, and the facial bruising was consistent with blunt force trauma, such as grabbing, pressing, or "smacking" the child. Dr. Bates testified that the injuries could have been caused by the child rolling off the couch, if the child hit the ground face first. On redirect, Dr. Bates stated that the autopsy revealed the cause of death to be "multiple blunt force trauma."

Tammy Poe testified that she had just been released from the hospital after an emergency C-

section when the victim, her child, died. She stated she was not on any medication at the time. Tammy Poe described the events of the night, stating that she went to bed at about 10:30 p.m., with the child in the bassinet beside her, while the Defendant was asleep on the couch. She told the Defendant to wake her up when the baby needed to feed. She never heard the child cry during the night, but she awoke several times to see if he was hungry. She attempted to give him a bottle twice, which the victim refused. The last time she attempted to feed the child was at 11:30 p.m., and, when she woke up the next morning at 10:00 a.m., the child was not breathing.

Tammy Poe further testified that the Defendant would frequently take care of the child, and she described an incident where the Defendant was bathing the child. The baby's face went under the water, and the Defendant "picked the baby up and pat[ted] him on the back real hard." The Defendant then laid the child on the edge of the couch, and, as the child began to fall off, the Defendant attempted to grab him around the waist, but the child's head hit the floor. The baby appeared to be okay after these two incidents, but he died the next day. Tammy Poe testified that she wanted to call an ambulance, but the Defendant said it would be best not to call anyone. The Defendant said the child would be fine. In demonstrating how the child was laying on the couch, Tammy Poe used a notebook to indicate that the child was more off the couch than on the couch. On cross-examination, Tammy Poe stated that there was a period of time when the Defendant was alone with the child.

The trial court determined that the death of the Defendant's child was caused by child abuse on the part of the Defendant. This was a violation of the Defendant's probation requirements, and, as such, his probation was revoked.

II. Analysis

On appeal, the Defendant alleges the trial court erred in finding the Defendant violated the terms of his probation. When a trial court determines by a preponderance of the evidence that a probationer has violated the conditions of his or her probation, the trial court has the authority to revoke probation. T.C.A. § 40-35-311(e) (2006). Upon finding that the defendant has violated the conditions of probation, the trial court may revoke the probation and either: (1) order incarceration; (2) order the original probationary period to commence anew; or (3) extend the remaining probationary period for up to two additional years. *State v. Hunter*, 1 S.W.3d 643, 644 (Tenn. 1999); see T.C.A. §§ 40-35-308, -310 -311 (2006). Upon a finding of a violation, the trial court is vested with the statutory authority to "revoke the probation and suspension of sentence and cause the defendant to commence the execution of the judgment as originally entered" *Id.*; accord *Hunter*, 1 S.W.3d at 646 (holding that the trial court retains the discretionary authority to order the defendant to serve his or her original sentence in confinement). Furthermore, when probation is revoked, "the original judgment so rendered by the trial judge shall be in full force and effect from the date of the revocation of such suspension" T.C.A. § 40-35-310. The defendant has the right to appeal the revocation of his probation and entry of his original sentence. T.C.A. § 40-35-311(e).

The decision to revoke probation is in the sound discretion of the trial judge. *State v.*

Kendrick, 178 S.W.3d 734, 738 (Tenn. Crim. App. 2005); *State v. Mitchell*, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991). The judgment of the trial court to revoke probation will be upheld on appeal unless there has been an abuse of discretion. *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991). To find an abuse of discretion in a probation revocation case, the record must be void of any substantial evidence that would support the trial court's decision that a violation of the conditions of probation occurred. *Id.*; *State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978); *State v. Delp*, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980). Proof of a probation violation is sufficient if it allows the trial court to make a conscientious and intelligent judgment. *State v. Milton*, 673 S.W.2d 555, 557 (Tenn. Crim. App. 1984). In reviewing the trial court's finding to revoke probation, it is our obligation to examine the record and determine whether the trial court has exercised a conscientious judgment rather than an arbitrary one. *Mitchell*, 810 S.W.2d at 735. In our view, after exercising a conscientious judgment as to whether or not a Defendant has violated the terms of a probated sentence, the trial court must also exercise a conscientious rather than arbitrary judgment as to an appropriate disposition. *State v. Steven Kelly Frazee*, No. M2005-01213-CCA-R3-CD, 2006 WL 618300, at *9 (Tenn. Crim. App., at Nashville, Mar. 13, 2006), *perm. app. denied* (Tenn. 2006).

In the case at bar, the trial court could have properly determined the Defendant violated his probation if the State proved, by a preponderance of the evidence, that the Defendant committed one of the crimes charged in the petition. Thus, at a minimum, if the trial court concluded that Defendant committed aggravated child abuse, the trial court could properly revoke the Defendant's probation. Aggravated child abuse requires that a person, knowingly, other than by accidental means, treat a child in such a manner to inflict serious bodily injury. See T.C.A. §§ 39-15-401(a), -402(a)(1) (2006).

The evidence presented at the probation revocation hearing included a description of the events the night before the child was found dead. The baby was being given a bath when he slipped under the water. The Defendant picked the child up, and, as the child began to cry, the Defendant shook it aggressively. The Defendant then placed the child on the edge of the couch, with more of the child's body off the couch than on it. As the baby fell, the Defendant attempted to catch him, but the baby's face hit the floor. Tammy Poe wished to call a doctor or take the child to the hospital, but the Defendant told her the child would be fine. When Tammy Poe went to sleep, the Defendant was left alone with the child.

Dr. Bates testified that the baby had extensive bruising on his chest, back, collarbones, face, head, and neck. Dr. Bates also testified as to a deep cut behind the child's ear, which went into the cartilage. The photographs entered into evidence reflect this. According to Dr. Bates, although the bruising to the chest could have been caused by CPR, the bruising around the collarbone would not have. Dr. Bates also opined the bruising around the child's face and head was caused by blunt force trauma such as grabbing or "smacking." The autopsy report indicated the child died of multiple blunt force trauma.

Evidence links the child's serious injuries to the Defendant's aggressively shaking the baby. We conclude there is substantial evidence to support the trial court's decision that the Defendant

committed aggravated child abuse and therefore violated the terms of his probation. We also conclude that the trial court made a conscientious judgment as to the disposition, considering the seriousness of the violation. The Defendant is not entitled to relief.

III. Conclusion

Based on the foregoing reasoning and authorities, we conclude there is substantial evidence to support the trial court's conclusion that the Defendant committed acts in violation of his probation. As such, we affirm the judgment of the trial court.

ROBERT W. WEDEMEYER, JUDGE